

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





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# 75-1381

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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 75-1381**

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IN RE FRANCIS JOSEPH MILLOW,  
*Appellant.*

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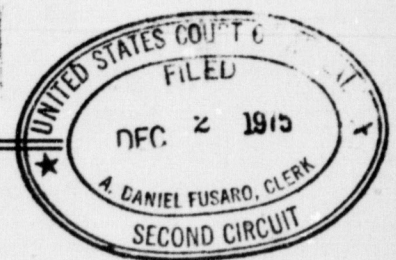
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**APPENDIX FOR THE UNITED STATES OF AMERICA**

---

THOMAS J. CAHILL,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In Re

:

Misc. 11-188

FRANCIS JOSEPH MILLOW, a witness  
before a Grand Jury.

:

:

----- x

Before:

HON. LAWRENCE W. PIERCE,

District Judge

New York, October 28, 1975  
Room 506 - 1:00 p.m.

APPEARANCES

PAUL J. CURRAN, Esq.,  
United States Attorney for the  
Southern District of New York  
By: Michael Abzug, Esq.,  
Assistant United States Attorney

MARK VARRICHIO, Esq.,  
Attorney for Witness

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2 (Case called.)

3 MR. ABZUG: Michael Abzug for the government.

4 THE COURT: Who is the movant?

5 MR. VARRICHIO: I am, your Honor. Mark Varrichio  
6 for Joseph Mllow.

7 THE COURT: Who wishes to be heard first?

8 MR. ABZUG: Perhaps I can put this in context,  
9 your Honor. Then we will have the moving party make the  
10 appropriate motion.

11 This involves a witness before the grand jury  
12 by the name of Francis Joseph Millow, your Honor. Mr. Millow  
13 was subpoenaed before the grand jury originally on  
14 October 6th of this year to testify in connection with the  
15 grand jury investigation into possible violations of  
16 federal laws pertaining to gambling in Westchester County.  
17 That appearance was put off upon the receipt of the  
18 motion papers from defense counsel which I believe your  
19 Honor has before you, in which he alleges that certain  
20 questions that were going to be propounded to Mr. Millow  
21 were predicated upon an illegal wiretap and also that  
22 Mr. Millow's testimony was unnecessary.

23 For those reasons he proposes to quash the  
24 subpoena. The motion was scheduled to be argued today,  
25 your Honor, and in anticipation of the result the government



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2 has rescheduled Mr. Millow's grand jury appearance for  
3 tomorrow at 4 o'clock.

4 THE COURT: Counsel?

5 MR. VARRICHIO: Your Honor, as the U.S. Attorney  
6 has clearly pointed out --

7 THE COURT: Why don't you skip the portion about  
8 being unnecessary. I don't feel we need get into that.  
9 But on the illegal wiretap aspect, let me hear you.

10 MR. VARRICHIO: Yes, your Honor. I represented  
11 Joseph Millow in Westchester County on a charge involved  
12 with a wiretap which I believe is the same wiretap that is  
13 being used in this particular case by the Assistant  
14 U.S. Attorney. There never was a hearing at all conducted  
15 by me or anyone that I know of to test the validity of the  
16 order which authorized the wiretapping.

17 Now, until such time as the government shows this  
18 court that the wiretap order is valid, I believe that the  
19 prospective witness is on firm legal grounds in refusing  
20 to answer questions based upon the wiretap and there has  
21 been some talk in the United States Supreme Court, in  
22 some cases that I have read. One of them is Alderman  
23 v. the United States, which is 89 Supreme Court 961 wherein  
24 the Court, and I'm sure this Court well knows --

25 THE COURT: What citation again?

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2 MR. VARRICHIO: 89 Supreme Court 961.

3 THE COURT: Wouldn't that be a very old case?

4 You mean to cite a case that old?

5 MR. VARRICHIO: It is not that old, your Honor.

6 THE COURT: We are in 300 something now.

7 Do you have the official citation?

8 MR. VARRICHIO: I just didn't write that one down,  
9 your Honor.

10 THE COURT: How old a case is it?

11 MR. VARRICHIO: 1973, your Honor. It is quite  
12 recent and it discusses what I believe is pertinent on  
13 one aspect of my motion. The Court basically said that  
14 if in fact there is illegal evidence obtained by means  
15 of wiretap, then it is inadmissible for all purposes in  
16 criminal proceeding and that certainly would include a  
17 grand jury investigation.

18 Now, once again, I point out the Court said if  
19 it is in fact illegally obtained. We don't know at this  
20 point whether or not it has been illegally obtained and the  
21 point that I am trying to make this morning, your Honor,  
22 is that I believe the government has the burden of coming  
23 forward to show that the order to obtain this evidence  
24 by means of the wiretap is valid and then if it is  
25 determined to be valid, then we get into the other



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2 questions as to whether or not the defendant should  
3 answer questions as to relevancy to this particular  
4 investigation.

5 THE COURT: Let's go back a little bit. It is  
6 acknowledged that there is an outstanding wiretap order  
7 signed, I assumed, by some federal judge?

8 MR. ABZUG: That is correct. No, that is incorrect,  
9 your Honor. I furnished copies of those -- the order  
10 applications and underlying affidavits to your Honor's  
11 chambers last week. There was an original order that  
12 was signed by Westchester County court judge on November 7,  
13 1974, I believe, your Honor, for a period which authorized  
14 interception of the telephone lines subscribed to to  
15 Mr. Millow for a period of thirty days. That order was  
16 extended for an additional period of thirty days, so  
17 essentially we are talking about a state wiretap order  
18 for a period of sixty days.

19 THE COURT: So what we have, then, is an order  
20 signed by a county judge of Westchester County.

21 MR. ABZUG: That's correct.

22 THE COURT: There are certain requirements  
23 of law which have to be met in any event to warrant  
24 the county judge signing a lawful order for wiretapping,  
25 correct?



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2 MR. VARRICHIO: That's right, your Honor.

3 THE COURT: So there is an obligation on not  
4 only the submitter of the proposed order, that would be  
5 the prosecutor, but an obligation on the judge to see that  
6 the requirements of law are met before he signs the order.  
7 Once he signs the order, I gather it is your position  
8 that there is still an obligation, whether in that court  
9 or in this court, to have some sort of a presentation made  
10 to demonstrate that it should have been signed, is that  
11 your view?

12 MR. VARRICHIO: Basically, what I am saying  
13 is once the point has been raised as to the legality  
14 of the order, then I think -- then there is an obligation  
15 to show that it is actually based upon the legal and  
16 proper means.

17 THE COURT: Do you have some authority to cite  
18 for your position, Mr. Varrichio?

19 MR. VARRICHIO: I did not come prepared with a  
20 memo of law on that particular point.

21 THE COURT: That is the only point I think that  
22 is before me.

23 MR. ABZUG: Your Honor, may I be briefly heard?

24 THE COURT: Yes, sir.

25 MR. ABZUG: I believe that the particular

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2 statute under which Mr. Varrichio is moving is Title 18,  
3 U.S. Code, Section 3504. The relevant Second Circuit  
4 cases construing that statute, your Honor, are United States  
5 v. Persico and that is at 491 F. 2d 1156. That was a  
6 recent Second Circuit case decided in 1974.

7 There is a more recent case, United States v.  
8 Grusse, decided on February 27th of this year. I have  
9 Xeroxed an opinion for your Honor. Basically, what these  
10 cases hold, your Honor, the government's burden of showing  
11 the legality of a wiretap affidavit, a wiretap order in  
12 the situation that you are now confronted with, that is,  
13 a grand jury witness, is a rather light one. It is the  
14 Court's obligation upon appropriate motion by the defendant  
15 to review the superficial legality of the wiretap order.  
16 In other words, you review the wiretap order on its face  
17 to determine whether there is sufficient probable cause,  
18 and once your Honor makes that determination, then the  
19 grand jury proceedings can go forward. I believe that is  
20 the law.

21 I do not believe that your Honor has to hold  
22 a full blown hearing, and for good reason. As your Honor  
23 could see, it would obstruct the grand jury inquiry  
24 unnecessarily.

25 THE COURT: All right, may I take a look at



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2 Grusse.

3 MR. VARRICHIO: Your Honor, may I address the  
4 Court on what the Assistant U.S. Attorney has just stated?

5 I am curious to know, since I haven't read the  
6 cases, Persico and the other one cited, whether or not  
7 that involved orders issued by federal judges or orders  
8 issued by state judges and I wonder if that would make  
9 a serious difference.

10 THE COURT: Well, let's see.

11 Frame the issue for me as you perceive it to be,  
12 counsel.

13 MR. VARRICHIO: The issue is this. Does a  
14 prospective witness before a grand jury have the requirement  
15 to answer any questions propounded to him prior to a  
16 determination that the questions which are going to be  
17 propounded to him are the result of a legal investigation?  
18 And, your Honor, on that particular issue --

19 THE COURT: Just a minute now. Do you wish to  
20 go further and suggest why you think there might be an  
21 illegality involved here?

22 MR. VARRICHIO: Yes, your Honor. There has  
23 been extensive use of wiretaps and wiretap orders, et  
24 cetera, involving this particular investigation and I have  
25 gone into it to some extent in Westchester County and the

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2 cases pending up there, I happen to have two of them,  
3 and I am not at all satisfied in my own mind that the  
4 information which led to any wiretap was obtained by  
5 legal means. I understand that there are affidavits  
6 that have been submitted by federal agents and state agent,  
7 et cetera, but I do not know where and when the investigation  
8 started, how it was commenced or things of that nature.

9 Now, I am sure that this investigation had to  
10 start somewhere with someone and until that information  
11 is furnished to this court or some other court, I do not  
12 see how anyone can possibly determine whether or not any  
13 information obtained as a result of this information has  
14 been legally obtained.

15 THE COURT: All right. Let the record show that  
16 I have reviewed the material furnished by the government  
17 attorney here in connection with the original wiretap order  
18 signed by the county judge of Westchester County.

19 That means I have reviewed not just the order but copies  
20 of the affidavit of Richard Spota, Carl Vergari, the  
21 District Attorney, Allan Lance Emory, special agent  
22 of the Federal Bureau of Investigation, and Robert  
23 Staton and the material appearing in those various  
24 affidavits in the view of this court represented  
25 a sufficient basis for the order which issued on December 7,



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2 1974 over the signature of the county judge in Westchester  
3 County. The Court hearing no further reason as to why  
4 this proceeding here should not proceed and recognizing  
5 that there is a strong public policy in the circuit of  
6 not permitting disruption of grand jury proceedings absent  
7 compelling reasons, the Court denies the order to vacate --  
8 sought by the motion, that is, declines to issue the order  
9 sought by the motion to vacate and quash the subpoena.

10 There is a further order of the Westchester  
11 County Judge and it is dated November 8, 1974, so now,  
12 counsel, I think you have sufficient record.

13 Is there anything further?

14 MR. VARRICHIO: Yes, your Honor. But I call  
15 two additional cases to the Court's attention.

16 THE COURT: Counsel, you could go on all day.  
17 I will hear argument once and I make my decision. Each  
18 time I finish making a ruling if you are going to site another  
19 couple of cases to me, I will be here all day trying to rule  
20 on the case. You have your record, such as it is.

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UNITED STATES GRAND JURY  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v- :

MICHAEL YANNICELLI :

- - - - -x

United States Court House  
Foley Square  
New York, New York

October 29, 1975  
4:30 o'clock p.m.

APPEARANCES:

Michael D. Abzug, Esq.

Special Attorney, U.S.  
Department of Justice

Steven Klein  
Acting Grand Jury Reporter

**NATIONAL REPORTING INC.**  
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FIVE WORLD TRADE CENTER  
NEW YORK, N. Y. 10048  
[212] 466-1280



1  
2 FRANCIS J. M I L L O W, called as a witness,  
3 having been sworn by the Foreman of the Grand Jury,  
4 testified as follows:

5 BY MR. ABZUG:

6 Q Sir, when you nod it doesn't reflect on the record.

7 Please identify yourself to the Grand Jury.

8 A Joseph Morrow.

9 Q Your true name, sir, is Francis J. Morrow?

10 A Francis Joseph Morrow.

11 Q Your address?

12 A 25 Cedar Street, North Tarrytown, New York.

13 Q My name is Michael D. Abzug, I am a Special Attorney  
14 with the Department of Justice. You have been subpoenaed  
15 before this Grand Jury to testify in connection with the  
16 Grand Jury's investigation into certain possible violations  
17 of Federal Law, specifically those laws dealing with income  
18 tax evasion and gambling which may be occurring in Westchester  
19 County and the upper Bronx. These possible violations of law  
20 are committed by individuals known to us as Michael Yannicelli,  
21 Peter Variano, Hank Bucci, Toby Massillo, Alphonse Coletti,  
22 and others.

23 Before I proceed let me advise you what your rights  
24 are under the United States Constitution. First you have  
25 an absolute right against self-incrimination. If you testify

1 before this Grand Jury and incriminate yourself, your testi-  
2 mony can and may be used against you in a courtroom of law,  
3 or any kind of proceeding whatsoever; do you understand that?  
4

5 A Yes.

6 Q Secondly, you have an absolute right to counsel.  
7 By counsel I mean a lawyer, either one of your own choosing,  
8 or if you can't afford one one will be appointed for you free  
9 of charge by the court.

10 You have counsel here today, do you not, sir?

11 A Yes.

12 Q And his name is Mark A. Varrichio?

13 A Yes.

14 Q Mr. Varrichio is standing outside in the ante room;  
15 is that correct?

16 A He is out in the hall.

17 Q The right to counsel is somewhat conditioned in a  
18 Grand Jury proceeding. By that I mean your counsel cannot  
19 be present in the Grand Jury with you, he must remain outside.  
20 However, if during the course of my questioning you wish to  
21 consult with counsel on a legal matter, you only need in-  
22 dicate your desire to Mr. Krugman, the Grand Jury Foreman,  
23 seated to your right in the gray suit, and Mr. Krugman will  
24 excuse you.

25 Do you have any questions?



1  
2 A No.

3 Q I also want to advise you, Mr. Morrow, that you are  
4 a target of this investigation, and that my questions here  
5 today were based upon electronic surveillance, physical  
6 surveillance of your movements in the past two years by the  
7 Federal Bureau of Investigation and local law enforcement  
8 officials, witnesses before this Grand Jury, and statements  
9 which you have made to myself, Mr. Emory, and Special Agent  
10 Douglas Wilhelmi.

11 I also want to advise you that if during the course  
12 of this proceeding you don't understand any of my questions,  
13 I want you to indicate that to me so the questions can be  
14 rephrased; do you understand that?

15 A Yes.

16 Q Now, Mr. Morrow, do you know an individual by the  
17 name of Michael Yannicelli?

18 A I take the Fifth Amendment.

19 Q Do you know an individual by the name of Peter  
20 Variano?

21 A Again I take the Fifth Amendment.

22 MR. ABZUG: Will you mark this Grand Jury Exhibit  
23 No. 1, please. (So marked)

24 Q Showing you what has now been marked in evidence as  
25 Grand Jury Exhibit No. 1, have you seen that document before,

1  
2 or a copy of it?

3 A I have to show this to my lawyer.

4 THE FOREMAN: You are excused.

5 MR. ABZUG: Let the record reflect the time is 4:32.

6 (Witness excused, then returned)

7 MR. ABZUG: Let the record reflect it is now 4:35.

8 Mr. Foreman, will you remind the witness he is  
9 still under oath.

10 THE FOREMAN: You are still under oath.

11 Q Have you had an opportunity to discuss what has been  
12 marked in evidence as Grand Jury Exhibit No. 1 with your  
13 attorney, Mr. Varrichio?

14 A That is immunity.

15 Q Has he explained to you the effect of this immunity  
16 order on your testimony here today?

17 A Yes, Mr. Varrichio told me--

18 Q It is not necessary for you to tell us what he told  
19 you.

20 He has discussed it with you; is that correct, sir?

21 A Yes.

22 Q I want to advise you what this order does, and you  
23 tell me if it is not consistent with what your attorney told  
24 you.

25 What this order does is it is an order from the court



1 which tells the Government it can't use your testimony against  
2 you in this proceeding.

3 A Right.

4 Q It does say that the Government can't prosecute  
5 you for the crime about which you are about to testify, and  
6 it does not say that you have a right to perjure yourself  
7 before this Grand Jury; do you understand that?  
8

9 A Yes.

10 Q Now, I want to emphasize the latter very carefully,  
11 and I want you to understand it because perjury in the  
12 Federal Court, as you know, is a very severe crime, it is  
13 punishable by five years in jail and a \$10,000 fine.

14 Let me read to you a portion of this order. This is  
15 an order signed by Judge John N. Cannella on October 10,  
16 1974.

17 Therefore, it is ordered pursuant to Title 18,  
18 United States Code, Section 6002 that the said Francis J.  
19 Millow give testimony which he refuses to give on the basis  
20 of his privilege against self-incrimination as to all matters  
21 about which he may be interrogated before said Grand Jury,  
22 and it is further ordered that no testimony or other in-  
23 formation compelled hereunder, or any information directly  
24 or indirectly derived from such testimony or other informa-  
25 tion, may be used against the said Francis J. Millow in any

1  
2 case, except a prosecution for perjury, giving a false  
3 statement or otherwise failing to comply with this order.

4 This order shall become effective only if after the  
5 date of this order the said Francis J. Morrow refuses to  
6 testify or provide other information on the basis of his  
7 privilege against self-incrimination."

8 I also wish to emphasize to you the portion of this  
9 order which says that you must testify in this Grand Jury  
10 here today otherwise you are going to be held in contempt.

11 Do you understand that?

12 A I must testify today?

13 Q Yes, you must testify today otherwise the Government  
14 will move to hold you in contempt.

15 A I am taking the Fifth Amendment due to the appeal,  
16 I have an appeal, so I don't have to testify before the Grand  
17 Jury, certain motions.

18 Q Now, I ask you again, sir, do you know an individual  
19 by the name of Michael Yannicelli?

20 A I take the Fifth.

21 Q Sir, you cannot take the Fifth. The effect of this  
22 immunity order forces you to testify. You must testify be-  
23 fore this Grand Jury.

24 A I must testify?

25 Let me talk to my lawyer.



2 MR. ABZUG: Let the record reflect it is now 4:38.

3 (Witness excused, then returned.)

4 MR. ABZUG: Let the record reflect it is now 4:40.

5 Q Mr. Millow, have you had an opportunity to consult  
6 with counsel?

7 A Yes, I just consulted with counsel.

8 Q Now, Mr. Millow, the last question that was posed  
9 to you, and that is still pending, was do you know an in-  
10 dividual by the name of Michael Yannicelli?

11 I am going to direct the Foreman of the Grand Jury  
12 to direct you to answer the question.

13 THE FOREMAN: I so direct.

14 Q Now, sir, do you know a man by the name of Michael  
15 Yannicelli?

16 A My attorney advised me not to answer any questions  
17 until the appeal goes before the Judge whether I should  
18 testify before this Grand Jury or not, the Judge has to make  
19 a decision.

20 My lawyer told me that.

21 Q You understand, sir, that it is the Government's  
22 present intention now to make a motion before the court under  
23 Title 28, United States Code, Section 1826A to hold you in  
24 civil contempt. If the Judge holds you in civil contempt  
25 you will sit in jail for 18 months--is this boring you?

1  
2 A No, it is not.

3 Q --for 18 months, or until you decide to testify  
4 before this Grand Jury.

5 It is the Government's further intention to make a  
6 motion pursuant to Section 1826B of that title to immediately  
7 remand you to the custody of the United States Marshall  
8 on the grounds that your appeal is frivolous; do you under-  
9 stand that, sir?

10 A That my appeal is what?

11 Q Frivolous, it has no merit.

12 A We didn't go before the Judge yet, that is what we  
13 are waiting for.

14 Q As long as you understand that, sir.

15 A My attorney advised me.

16 Q Mr. Morrow, let me ask you one further question,  
17 before you leave. Isn't it a fact, sir, that one of the  
18 reasons that you don't want to testify today is because you  
19 are afraid of reprisals by a man by the name of Michael  
20 Yannicelli and Larry Black; isn't that a fact, sir?

21 A My lawyer told me not to answer any questions until  
22 we go before the Judge, let the Judge make that ruling  
23 under the Fifth Amendment again.

24 MR. ABZUG: You understand, sir, that you have no  
25 Fifth Amendment privilege before this Grand Jury at



1  
2 this time.

3 Would you excuse the witness?

4 THE FOREMAN: You are excused temporarily?

5 (Witness excused)  
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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X  
4 IN RE: FRANCIS J. MILLOW, :  
5 a witness before the Grand Jury. :  
6 v. : M-11-188  
7 SEALED BY ORDER OF THE COURT. :  
8 -----X

9 Before: HON. LAWRENCE W. PIERCE, D.J.

10 New York, October 31, 1975;  
11 2.30 P.M.

12  
13 APPEARANCES:

14 PAUL J. CURRAN, ESQ., United States Attorney for the  
15 Southern District of New York;  
16 BY: Michael D. Abzug, Esq., Special United States Attorney  
17 Strike Force.

18 MARK A. VARRICHIO, ESQ.,  
19 Attorney for Francis J. Millow.

20 PRESENT:

21 Harry Krugman, Grand Jury Foreman.  
22 Steven Klein, Grand Jury Stenographer.  
23  
24  
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2 THE COURT: How long is this Special Grand  
3 Jury going to sit?

4 MR. ABZUG: Excuse me, your Honor, this is a  
5 closed proceeding and we have a gentleman who is not  
6 authorized. This gentleman seated in the back in the  
7 leather jacket is not authorized to be here.

8 THE COURT: All persons not authorized to be  
9 present in the courtroom at this phase of the proceeding  
10 please leave the courtroom.

11 MR. ABZUG: I beg your pardon, your Honor.

12 THE COURT: This Special Grand Jury is authorized  
13 to sit for how long?

14 MR. ABZUG: The one that was impaneled on  
15 October 16, 1975, is authorized to sit until April 16,  
16 1977, 18 months, your Honor.

17 THE COURT: Where is the foreman of the grand  
18 jury?

19 MR. ABZUG: Your Honor, the foreman of the grand  
20 jury is seated behind me. This is Mr. Harry Krugman.

21 I would also like to present to the Court Mr.  
22 Steve Klein seated behind me who is the grand jury reporter,  
23 who is responsible for preparing the grand jury minutes  
24 which I furnished to your Honor's chambers yesterday.

25 Your Honor, if I may just briefly recite the  
facts. On October 30, 1975, Mr. Francis J. Millow came

1 before this grand jury and was asked certain questions  
2 which were relevant to the grand jury inquiry as to whether  
3 gambling violations had occurred in Westchester County.  
4 After I posed a number of questions to him which related  
5 to suspect members of that conspiracy Mr. Millow took the  
6 Fifth Amendment. Thereafter I read him an order marked  
7 into evidence as Grand Jury Exhibit No. 1, which is an  
8 order of immunity signed by Judge Cannella on October 10,  
9 1975, which granted him immunity. Mr. Millow asked to be  
10 excused, consulted with his attorney, Mr. Varrichio, who  
11 was there with him, came back into the grand jury and  
12 said that he had consulted with his attorney and that he  
13 understood the effect of the immunity order. I thereafter  
14 explained the effect of the immunity order to Mr. Millow  
15 on the record. Mr. Millow said he understood it. He  
16 was asked again whether he knew certain people who the  
17 grand jury suspected were involved in this gambling con-  
18 spiracy in Westchester County. Mr. Millow refused to  
19 answer the question again notwithstanding the immunity  
20 order on the grounds of his intention to file an appeal  
21 from the Court's ruling which was made on October 29,  
22 1975, the preceding day before his grand jury appearance.  
23 The government at that time indicated its intention to  
24 seek a civil confinement order without bail pursuant to  
25



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2 Title 28, United States Code, Section 1826, Subsections  
3 (a) and (b). Mr. Millow asked to be excused, consulted  
4 with his attorney, came back into the grand juryroom and  
5 still refused.

6 Now, at this time, your Honor, the government  
7 does not know whether in fact the defendant has filed an  
8 appeal from your Honor's ruling. In any event, your Honor,  
9 the government submits that it is clear from the tenor  
10 of the defendant's legal argument on October 29, which I  
11 believe is rather insubstantial, and the facts alleged  
12 in my affidavit, that this appeal is frivolous and taken  
13 solely for the purpose of delay.

14 In any event, your Honor, I felt it was my  
15 obligation to bring these facts as quickly as possible  
16 before you determine, (a), whether Mr. Millow is in fact  
17 in contempt within the meaning of the statute and whether,  
18 (b), he should be permitted bail pending appeal on your  
19 Honor's ruling on October 29.

20 THE COURT: All right, Mr. Varrichio, I will  
21 hear you on it.

22 MR. VARRICHIO: Yes, your Honor. At this time,  
23 your Honor, may I submit an affidavit signed by my client  
24 about ten minutes ago in support of my application which  
25

1 gp

2 contains most of the arguments which I intend to make here  
3 today and at the outset might I state --

4 THE COURT: Has the government received a copy  
5 of this?

6 MR. ABZUG: I did a few minutes ago, your  
7 Honor.

8 THE COURT: All right.

9 MR. VARRICHIO: Might I state that I have  
10 great respect for this Court and for the laws of the United  
11 States of America, and that my client has the same respect  
12 and at no time have we ever intended to toy with this Court  
13 or to file a frivolous appeal, nor do we intend to delay  
14 the wheels of justice, so I would like that set aside at the  
15 outset.

16 Now, there are certain aspects of this case  
17 which I think the government should explain and before  
18 going into what the government should explain, the papers  
19 submitted here today by Assistant U.S. Attorney Abzug  
20 contain certain misstatements of facts concerning my  
21 conduct which irritate me greatly and a reading of them  
22 would tend to indicate that I tried to delay these pro-  
23 ceedings.

24 There was, first of all, no such intent.

25 Secondly, Mr. Abzug and I have been in almost  
constant contact since the outset of this proceeding and



I have either been on trial or he has been on trial, and that is the reason why we had to have some delays.

THE COURT: You don't have to address that.

MR. VARRICHIO: But it irritates me, your Honor.

THE COURT: All right, you have it cleared up now.

MR. VARRICHIO: Thank you.

Now getting to the merits of my argument, Mr. Millow conferred with me prior to my making my original motion on October 28 and was unable to specify, and the Court asked me to specify, any specific instances of governmental misconduct. It was impossible for me to do so because I did not have any facts to base that statement, but I had a suspicion that there must have been some prior investigation before the application had been made to obtain an order to tap his phone on November 7. Fortuitously, and it seems there are people who watch over -- they say drunks and incompetents. Fortuitously, the Assistant U.S. Attorney Abzug in a grand jury appearance, and it should be on the minutes at approximately 4.30 on October 29, made a statement and his statement said, basically, in substance and effect, that the government had had surveillance of Joseph Millow for a year and a half to two years prior to that date both physically and by telephonic eavesdropping and if that be the fact, then

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2 what we suspected to be true is in fact true, that there  
3 had been prior eavesdropping on Joseph Millow and the  
4 probability is that there has been an illegal wiretap of  
5 his phone. Now, that is the substance of my argument.  
6 Now, I have put some cases into my affidavit and some  
7 pretty prominent judges have spelled out what I think should  
8 be the law, if it is not in fact the law, in these exact  
9 facts because I have not found a case exactly on all fours  
10 with this one, but I think we well know that if there is  
11 illegally obtained evidence as a result of an illegal  
12 wiretap, that no questions can be propounded concerning  
13 that before a grand jury, and I have a citation for the  
14 United States Supreme Court that says that. That's the  
15 Gelbar case.

16 Now we go to the next step. I have not  
17 demonstrated yet that the wiretap is illegal or that  
18 there has been evidence obtained as a result of an illegal  
19 wiretap, but I intend to do so.

20 Now I say the defendant's right to determine  
21 whether or not the questions which will be propounded  
22 before a grand jury are the result of illegally obtained  
23 evidence is paramount at this point and stays in the  
24 proceedings to the government's right to propound the  
25 questions and then wait for us to be upheld on appellate



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review and Justice Douglas sitting as a District Court Justice more or less said the same thing, and that's the Maddis v. Myers case. He said appellate review does not unring the bell once it has been rung, and that's exactly the point I am trying to make here, your Honor.

Now on the point of delay and the urgency of this investigation, and that's the main point here as far as I am concerned, if Joseph Millow is put before the grand jury on July 4, 1977, and asked the same questions as he would be today, this investigation in my opinion would in no way be hindered. There is no prejudice to the government in delaying this to determine whether or not there was a legal tap of the defendant's phone, but on the other hand there is prejudice to Mr. Millow if at this time the government decides to proceed and asks him questions before a grand jury before it has been determined that his phone has been tapped legally.

THE COURT: All right, Mr. Abzug.

MR. ABZUG: Well, to begin with, your Honor, just as a factual matter, I respectfully invite your Honor's attention to page 4 of Mr. Millow's grand jury transcript, which I believe I have appended to my moving papers in which Mr. Millow was advised as follows. This is with respect to the contention that I said that he was under electronic surveillance for two years. This is what I advised Mr.

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2 Millow:

3 "I also want to advise you, Mr. Millow, that  
4 you are the target of this investigation and that my  
5 questions here today were based on electronic sur-  
6 veillance, physical surveillance of your movements  
7 in the past two years by the Federal Bureau of  
8 Investigation and law-enforcement officials, witnesses  
9 before this grand jury and things that you have made  
10 to myself, Mr. Emory and Special Agent Douglas  
11 Wilhelmy."

12 I think Mr. Millow misunderstood what I was  
13 advising him. I merely advised him that his physical  
14 movements had been under surveillance, not that his phone  
15 had been tapped as apparently he told his defense attorney  
16 for two years. That is not the case, your Honor. I am  
17 familiar with all aspects of this investigation, your Honor.  
18 There is no electronic surveillance that has been placed on  
19 either a premises controlled by Mr. Millow or a telephone  
20 which is registered to Mr. Millow or which Mr. Millow used  
21 other than the ones that have been placed before your Honor.  
22 That is the only electronic surveillance that I am aware of  
23 in this case, and since I am the attorney who is going to  
24 be propounding these questions, your Honor, before the  
25 grand jury, I believe that that's dispositive.



1  
2 With respect to that point, your Honor, I am  
3 not quite clear still what Mr. Millow's argument is. He  
4 alleges that the electronic surveillance is illegal. Now,  
5 that is a very, very broad allegation, your Honor, with  
6 no citation of authority, certainly on the October 28th  
7 hearing, and no relevant citation I would submit today.  
8 He had the affidavits, orders and applications which I  
9 submitted to your Honor a week before the October 28th  
10 hearing, well in advance of that hearing. He had an  
11 opportunity to review them for their facial sufficiency  
12 and apparently has been unable to point to any particular  
13 thing that's wrong with those affidavits. I mean, I am  
14 not trying to create legal issues for the government, but I  
15 mean, there can be a variety of things. He can argue,  
16 for example, that the affidavit didn't have probable cause  
17 on their face; he can argue that the affidavit didn't show  
18 other investigative means had been exhausted. I mean,  
19 there are a number of other things he could have brought  
20 to the Court's attention and didn't do so. He merely  
21 makes an allegation somewhat up in the air, I believe, that  
22 the electronic surveillance predicated upon the orders  
23 that your Honor has initiated as nearly as I can tell  
24 by unlawful information, a taint argument as nearly as I  
25 can understand it. There is no evidence of that, your

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Honor. Your Honor would be forced to hold some sort of a hearing, which I think the law clearly doesn't require you to do, to determine this, and I submit to your Honor that this is a frivolous appeal. It is an appeal from a ruling that your Honor made upon a very broad and nebulous attack on the government's affidavit.

I submit to your Honor moreover based upon what Mr. Millow told me in my office prior to his grand jury appearance that the real reason that Mr. Millow does not want to testify before the grand jury is not to preserve his legal rights, but simply because he is reluctant to testify against Michael Yannestelle, and this has been going on for a month, your Honor.

With respect to prejudice to the government, the government has been forced to represent four months of grand jury investigation to a new grand jury and some of this is attributable to Mr. Millow's recalcitrance.

THE COURT: Has immunity been granted to Mr. Millow?

MR. ABZUG: Yes.

THE COURT: Use or transactional?

MR. ABZUG: It was use immunity, your Honor, and I offer to your Honor the original of that order for your examination.



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2 MR. VARRICHIO: Your Honor, might I answer  
3 some of the things that the Assistant United States  
4 Attorney has just stated?

5 THE COURT: Yes.

6 MR. VARRICHIO: First of all, on the point of  
7 this grand jury having been around for four months, I don't  
8 believe that Joe Millow received a subpoena until October 1,  
9 so that four-month business has absolutely nothing to do  
10 with us, and it sort of fortifies my argument that the  
11 government has more or less taken a leisurely approach to  
12 examining Mr. Joseph Millow. It has just become urgent  
13 now because he can be held in contempt.

14 Now on the question of use immunity and the  
15 other arguments that I might have raised if I were that  
16 type of a lawyer, I don't seek to be a person who raises  
17 frivolous issues nor to hang my hat on legal technicalities.  
18 I believe Joseph Millow has a firm right to stand up and  
19 say the government has not operated properly, they have  
20 operated by means of an unjust, illegal wiretap order,  
21 and until such time as the government can show me that  
22 they have obtained a legal wiretap of my phone, I refuse  
23 to testify in any proceeding whatsoever.

24 Might I say on that point I haven't seen the  
25 grand jury minutes, but Mr. Abzug has quoted from them and



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2 I would like to see page 4, if I might, so that I might  
3 call the Court's attention to exactly what I say is true  
4 is true. Might I refer to the government's, your Honor,  
5 for the purpose of completing my argument?

6 THE COURT: All right.

7 MR. ABZUG: Your Honor, I have a copy I can  
8 furnish Mr. Varrichio.

9 THE COURT: Would you be good enough to direct  
10 your attention to a particular case in this circuit, and  
11 that is the Persico, in the matter of Alphonse Persico,  
12 491 Fed. 2d 1156, Second Circuit Court of Appeals. It is  
13 a 1974 case, Judge Waterman writing for the Court. It  
14 states on page 1162:

15 "We hold that in contempt proceedings initiated  
16 when a witness who has been granted 'derivative  
17 use' immunity refuses to answer questions propounded  
18 by a grand jury because he claims he is entitled to  
19 a hearing to ascertain whether the questions posed  
20 are the product of unlawful electronics surveil-  
21 lance, the witness is not entitled to a plenary  
22 suppression hearing to test the legality of that  
23 surveillance. We hold that the refusal will be  
24 permissible only if there is an absence of a necessary  
25 court order or if there is a concession from the

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government that the surveillance was not in conformity with statutory requirements, or if there is a prior judicial adjudication that the surveillance was unlawful."

MR. VARRICHIO: Your Honor, I thank you for reading that to me. I haven't read that case, but where it says concession by the government, I would say that on page 4 we have the concession by the government which we are talking about, and I will read it to you again just in case it was read a little bit too rapidly.

THE COURT: No, I have read it and I have heard it and Mr. Abzug has undertaken to explain it. He has made a representation to the Court concerning it.

MR. VARRICHIO: His representation is --

THE COURT: It is just what he said a few minutes ago.

MR. ABZUG: If I may just briefly be heard, your Honor. With respect to the Persico case, the issue raised by the defendant in this case is even much narrower than the Persico case. The issue in this case is simply the legality of onset of wires, or one set of affidavits, and I believe the Persico case was brought under Section 3504, if I am not mistaken, which entails a different set of inquiries. I believe your Honor is absolutely correct.



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2 THE COURT: It's an appeal from an adjudication  
3 of civil contempt pursuant to 28 United States Code 1826(a),  
4 for refusal to answer a question propounded by a grand  
5 jury.

6 MR. ABZUG: Right. I believe the motion that  
7 was made in that case was pursuant to 3504, which has not  
8 been made in this case, your Honor.

9 THE COURT: I see. All right, let me make a  
10 ruling.

11 MR. VARRICHIO: Your Honor, before you make  
12 your ruling, might I once again argue on that point on page  
13 4?

14 THE COURT: Counsellor, I think I have got it.  
15 You are making reference to the portion where there is an  
16 indication that there were certain types of surveillance,  
17 electronic surveillance, physical surveillance, and so forth,  
18 is that correct?

19 MR. VARRICHIO: Yes, your Honor.

20 THE COURT: Mr. Abzug has stood here and made  
21 a representation concerning that.

22 MR. VARRICHIO: Might I say this to the Court.  
23 Just because Mr. Abzug stands here today and says something  
24 different than he said on October 30, does that make that  
25 a fact?



1  
2 THE COURT: Mr.Varrichio, I will assume that I  
3 have heard everything that both sides have to present in  
4 connection with this matter.

5 On October 28, 1975, Mr. Millow's attorney,  
6 Mr. Varrichio, brought on before me a motion seeking to  
7 quash a grand jury subpoena on the ground that the testimony  
8 of Mr. Millow was unnecessary and that the electronic  
9 surveillance underlying the investigation, the existence of  
10 which was explicitly admitted by the government, was  
11 illegal. Counsel for the witness cited no specific pro-  
12 vision of law which he claimed had not been complied with  
13 in obtaining the electronic surveillance nor was there cited  
14 any persuasive authority in support of the proposition  
15 that the burden was on the government to prove that all  
16 of the provisions of the law have been complied with in  
17 what it appears would amount to a full suppression hearing.

18 I reviewed the applications, the affidavits  
19 and orders underlying the electronic surveillance in this  
20 case and found them to be legally sufficient on their  
21 face. I therefore deny the motion to quash the subpoena  
22 and direct the witness, through Mr. Varrichio, to answer  
23 the grand jury's inquiry.

24 The witness, according to the minutes of the  
25 grand jury proceedings dated October 29, 1974, apparently

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2 has received a grant of immunity --

3 MR. ABZUG: Excuse me, your Honor, it is 1975.

4 THE COURT: The witness has received a grant  
5 of immunity so that there does not appear to be any  
6 Fifth Amendment privilege issue, and then on October 29,  
7 1975, the witness again refused to testify after con-  
8 sultation with Mr. Varrichio, after having been advised by  
9 Mr. Abzug that he had immunity and that if he refused to  
10 testify he could be held in contempt, and he refused to  
11 testify after being directed by the foreman of the grand  
12 jury to testify. The witness apparently indicated that he  
13 would not testify because he intended to appeal the October  
14 28, 1975, order of this Court. Mr. Abzug then indicated  
15 to Mr. Millow that on behalf of the government, the grand  
16 jury, Mr. Abzug would move to have Mr. Millow held in  
17 civil contempt pursuant to 28 United States Code, Section  
18 1826(a), and to have him remanded immediately into custody  
19 pursuant to 28 United States Code, Section 1826(b).

20 Now, Mr. Millow, please stand. Do I understand  
21 that you have refused and you continue to refuse to testify  
22 despite the Court's order of October 28, 1975, that you  
23 must testify?

24 MR. VARRICHIO: Your Honor, might I address  
25 the Court on behalf of Joseph Millow? He will answer



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2 the question, but he would like me to speak for him because  
3 he is nervous and he can't remember what he wants to say,  
4 but in answer to that question, at this time are you  
5 prepared to testify before the grand jury concerning the  
6 matters before this Court now? Are you prepared to go  
7 before the grand jury and testify at this time?

8 THE COURT: Wait a minute, if he can answer your  
9 question he can answer my question.

10 My question to you, sir, is do I understand  
11 correctly that you have refused to testify and you persist  
12 in your refusal to testify before the grand jury as  
13 directed by this Court via its order of October 28, 1975,  
14 that you should testify; that you must testify?

15 MR. MILLOW: Yes.

16 THE COURT: Yes, you do continue to refuse to  
17 testify?

18 MR. MILLOW: Yes.

19 THE COURT: Do you understand that should you  
20 persist in your refusal you can be summarily confined until  
21 such time as you are willing to give such testimony or  
22 provide such information and such confinement can exceed  
23 the life of the term of the grand jury, which in this case  
24 that would mean April of 1977?

25 In any event, you cannot be confined for longer



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2 than 18 months. Your confinement may not exceed 18 months.  
3 Do you understand that that is what the law provides if  
4 you persist in your refusal to testify?

5 MR. MILLOW: Yes, your Honor.

6 THE COURT: All right, then, I will grant the  
7 order requested by the government that you be confined at  
8 Manhattan Correctional Center, New York City, until such  
9 time as you are willing to testify before the grand jury  
10 or until the expiration of the term of the grand jury,  
11 whichever first occurs, but in any event, such confinement  
12 is not to exceed 18 months. It is so ordered. Get the  
13 marshal.

14 MR. VARRICHIO: Your Honor, at this time may I  
15 be heard on the question of bail?

16 THE COURT: I will hear you, counsellor.

17 MR. VARRICHIO: Thank you, your Honor. I have  
18 come to know Joe Millow due to this gambling investigation,  
19 and he was indicted in Westchester County for similar charges  
20 that are pending before this Court, and he pleaded guilty  
21 because he was in fact guilty himself. He was examined  
22 by the Probation Department and placed on probation. He  
23 is trying to reconstruct his life and lead a life as a  
24 decent human being.

25 At this point in time I would tend to think

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that he has succeeded to a certain extent in reconstructing his life and if allowed to continue in the community he might just do that.

Pardon me, Joe, for saying this, we may salvage this human -- well, I will retract that, but we may salvage Mr. Millow from any fate worse than death by allowing him to continue to remain his community and to try to straighten out his life in conjunction with the Probation Department. Incarceration in no way will contribute to this man's rehabilitation and subsequently becoming a useful member of our community.

On the question of finances and roots in the community which are very important on the question of bail, as far as I know it Joseph Millow is one step away from the poorhouse. He has no funds. He gets on jobs to support himself. He lives with his father. He is unmarried and he has lived in this North Tarrytown community, I believe it is, all of his life. He has very substantial roots in the community in that he has lived in one area all his life and continues to do so.

I might add that the government has offered to relocate him in exchange for his testimony.

MR. ABZUG: I object to that, your Honor.  
I think that is totally improper.



1  
2 MR. VARRICHIO: I think it is proper on the  
3 question of bail.

4 THE COURT: Let me tell you what would be  
5 proper on the question of bail, counsellor. It is really  
6 a very narrow question. It is not so much his roots and  
7 his status, but, rather, whether or not some novel or  
8 significant legal question is presented which warrants  
9 appellate attention. Now, the District Court has to make  
10 an initial determination about that even though ultimately  
11 the Court of Appeals will have to decide the merits of the  
12 action taken here.

4 13 MR. VARRICHIO: Yes, your Honor.

14 THE COURT: So I think I have heard your argu-  
15 ment sufficiently to know what you are going to say about  
16 that.

17 MR. VARRICHIO: I understand that, your Honor.

18 THE COURT: Is there anything new that you wish  
19 to add on the question of whether or not an appeal would be  
20 frivolous here?

21 MR. VARRICHIO: Your Honor, this is a very  
22 difficult spot that I am in, but I am going to try not to  
23 bore you and not to be redundant because it is so important  
24 to my client. I know that you firmly believe that your  
25 decision is absolutely correct and that you have made your



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2 decision based upon what you believe to be the law, but  
3 in my experience, and my tutorship was under the firm of  
4 Sabbatino & Tortorelli, which I think is the finest criminal  
5 law firm to come upon this City in a long time, and we  
6 often had opinions which were subsequently proved to be  
7 erroneous as strongly as we believed in them at the time  
8 we made our decisions.

9 THE COURT: It happens all the time. That's  
10 why they are where they are and we are where we are.  
11 There is no quarrel with that. If the Court of Appeals  
12 feels differently I fully expect them to do, and I know they  
13 will do exactly what they are required to do by virtue of  
14 bheir oaths of office.

15 No, I really do not see from my vantage point  
16 that there is a novel or significant question on appeal  
17 here, counsellor. If I am wrong, and it ispossible I am  
18 wrong, let the appel'ate court say so, that's their job,  
19 since I have made my judgment at this level.

20 Further, even though I am not going to fix bail  
21 in this case you have the right, I daresay, to go to the  
22 Court of Appeals and get them to fix bail and convince them  
23 that I am wrong -- not only that I am wrong on the under-  
24 lying decision, but also on the bail question. That's  
25 your choice. I have to simply make the decisions that

are the district judge's decisions at this point.

Now, my decision on the question of bail is that I do find no novel or significant question of law and I believe that an appeal here is frivolous, counsellor, and I therefore remand the defendant with no bail to the custody of the Attorney General, as I previously announced, that is, until he is willing to testify before the grand jury or until the expiration of the term of the grand jury, whichever occurs first, and so long as that confinement does not exceed 18 months.

I don't think there is anything further. You have got your record, and your next step then is with the Court of Appeals.

MR. VARRICHIO: Thank you very much, your Honor.

Excuse me, the defendant wants to say something to me.

THE COURT: The record in this case is to be sealed.

MR. VARRICHIO: He wasn't significant, your Honor.

THE COURT: All right, Marshal, remand.

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